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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 884 87

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BUETCH, DECEASED, RESPONDENT.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

MORISON R. WAITE,
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WILLIAM A. EGGERS,
Counsel for Petitioner.

(34,203)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 894

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED, RESPONDENT.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

Preliminary Statement.

This case arose in the Circuit Court of Jackson County, Indiana. The decedent was injured October 24th, 1917 (R. 210), under circumstances which this Court held made him an employee in interstate com-

merce (B. & O. S. W. R. R. Co. *v.* Burtch, 263 U. S. 540). After judgment for the plaintiff (R. 14) and while the case was pending in the Supreme Court of the state, the plaintiff died (R. 102). Upon reversal by this Court, the administratrix filed an amended complaint March 5th, 1924 (R. 34), asking for damages not only because of the injuries sustained by Burtch during his lifetime, but also for damages to the widow and children because of Burtch's death. One of the questions is whether a recovery can be had on account of the death where the suit is filed more than two years after the death has occurred, and where the employee during his lifetime brought suit and recovered a judgment subsequently reversed by this Court. There is no denial that the case is one under the Federal Employers' Liability Act and that the suit for the death was filed more than two years after the death.

In Atlantic Coast Line Railroad *v.* Burnette, 239 U. S. 199, this Court held that even though not pleaded, if the defendant insists upon the point that an action based on the Employers' Liability Act has been brought after the period of limitation, and that is admitted, the action cannot be maintained. The respondent insists that the circumstances except the present case from the limitation period, and the Indiana State courts sustained the respondent. The Railroad Company insists that the action for the death can not be maintained.

Another question involves assumption of risk as to a defect in a single appliance that was not detected until after the accident and also liability on the part

of the master when ordinary care failed to reveal the defect. The state court held that the Railroad Company had to prove knowledge and an appreciation of the danger before the risk was assumed.

The Amended Complaint.

The so-called amended complaint consisted of three paragraphs, one under the state law (R. 34), one under the common law (R. 38), because of injuries, and the third (R. 41) under the federal law, for damages sustained by the decedent while alive, and for damages sustained by the next of kin because of the death.

Objections by the Petitioner.

Your petitioner in the state court at every seasonable opportunity raised objection to the state court entertaining the cause of action based on the death. This was done by motion to separately state and number (R. 44), by motion to strike (R. 45 and 59), by demurrer (R. 52), by answer (R. 56), and by objecting to instructions tendered on behalf of the plaintiff and given by the court (R. 90-96, see note middle page 102 of Record), and by objections to the introduction of evidence (R. 205, 228, 229, 231, 232). The substance of the rulings by the state courts was that the cause of action based on the death could properly be considered. The jury were told that the plaintiff was entitled to damages not only on account of the injuries but also on account of the death, and that there was no bar to the death claim either by way of limitation or otherwise.

The Supreme Court of the state affirmed the trial court, and held (R. 277) that the addition of the cause of action on account of the death was simply an amplification of the original cause of action on account of the injuries. The Supreme Court also held that this Court sanctioned the addition of the death action because at the time of your reversal and remand you knew that Burtch was dead. The State court likewise held that the employee does not assume the risk of a defect in a simple appliance selected by him where the opportunity of inspection is the same as that of the master and the latter could no more readily than the employee detect the infirmity.

Instructions.

The court, among others, gave Instructions Nos. 10 (R. 94), 13 (R. 94-95), and 14 (R. 95) over the objection of the Railroad Company. For convenience, we quote those instructions in full. They read as follows:

> "No. 10. You are further instructed that if you find from the evidence, that said Guerney O. Burtch prior to his death would have had a right to recovery against defendant for personal injuries sustained by him because of the alleged negligence set forth in the third paragraph of complaint herein, and you further find that his death resulted in whole or in part from such negligence, then the plaintiff herein as administratrix of his estate would be entitled to recover in this action not only such damages as said Burtch might have recovered for his said injuries immediately before he died, but also all

damages sustained by his widow and children because of his death."

"No. 13. If you find that on or about the 24th day of October, 1917, Guerney O. Burtch suffered personal injuries as alleged in the complaint herein, and that within two years thereafter he commenced an action against defendant in the Jackson Circuit Court of Jackson County, Indiana, for damages sustained because of such injuries, and in such action he was later awarded judgment in said court, and that defendant duly appealed from said judgment to the Supreme Court of Indiana, and that while said appeal was pending said Guerney O. Burtch died, and afterwards said judgment was reversed, and said cause remanded to said circuit court, and that on the 5th day of March, 1924, the plaintiff herein as the administratrix of the estate of said Burtch, filed an amended complaint for the damages sustained because of such injuries and because of his death, then you are instructed that the statute requiring an action to be commenced within two years after the cause of action accrues does not apply, and this action is not barred by said statute or by any other statute of limitations."

"No. 14. If you find for the plaintiff, it will then become your duty to determine the amount of damages to be awarded, and in fixing the amount of damages it is proper for you to take into account the age, condition of health, habits with respect to industry and earning capacity of Guerney O. Burtch at the time he received the injuries shown to have been sustained by him and mentioned in the complaint, the nature of

his said injuries, the amount and valuation of time lost, if any, because of said injuries, expenses incurred by him, if any, for medical and surgical aid, medicines, nursing and traveling expenses in attempts to heal and cure for said injuries, and the pain and suffering resulting from such injuries and sustained and suffered by him during his lifetime, so far as shown by the evidence; and if you find for the plaintiff upon the third paragraph of complaint and that his death was due in whole or in part to said injuries, you will also add such further amount as will fairly compensate his widow and children for the damages sustained by them because of his death, which should include such reasonable support and maintenance as he would probably have furnished them, and such care, education, counsel and guidance of his children as he would probably have given them during minority, in the light of the evidence, and fix the damages at such sum as will fairly compensate, so far as money can do, for the damages sustained, not exceeding thirty thousand dollars."

It will be observed that the court told the jury in Instruction No. 10 that if they found for the plaintiff, then the plaintiff would be entitled to recover "not only such damages as said Burtch might have recovered for his said injuries immediately before he died, but also all damages sustained by his widow and children because of his death."

Again, in Instruction No. 13 (R. 95), the court said:

> * * * "you are instructed that the statute requiring an action to be commenced within two years after the cause of action accrues does not

apply, and this action is not barred by said statute or by any other statute of limitations."

It will be further noted that this is not limited to the injuries sustained by the decedent, but the court, in speaking of the damages to be recovered, adds the phrase, "and because of his death."

The error which we think exists was repeated by Instruction No. 14, where the jury were told that if they found for the plaintiff that damages could be returned because of the injuries received and also because of the death.

It also appears from the record that objections on the same grounds were made at various times in the proceedings in connection with the introduction of evidence (R. 205, 228, 229, 231, 232), all of which objections were overruled by the state court.

Your petitioner likewise objected to the giving of Instruction No. 8½ (R. 93), as requested by the plaintiff, which charged the jury that the decedent did not assume the risk unless he knew of the defect and appreciated the hazards and dangers to which he was about to be exposed, thus counteracting instructions given at the request of the Railroad Company (R. 85-86), which in substance charged the jury that the plaintiff assumed the risk where the situation was as open and apparent to the employee as it was to the Railroad Company.

Specifications of Error.

The state court erred in overruling the Railroad Company's motion (R. 44), to separately state and

number, and its motion to strike from the amended petition all reference to the death claim (R. 45 and 59). The same error was repeated when the state court overruled the demurrer (R. 52), setting up the statute of limitations, when it gave the instructions tendered by the plaintiff that the two-year limitation period did not bar the claim on account of the death (R. 90-96; see note middle page 102 of Record), when it instructed the jury that if they found for the plaintiff they must return damages not only because of the injuries but also because of the death, and when it permitted the introduction of evidence relating both to the injuries and to the death (R. 205, 228, 229, 231, 232). The Supreme Court affirmed, thereby approving the rulings of the court below, and thereby committing the same errors as the trial court.

Further, the State Supreme Court erred in sustaining the trial court as to Instruction No. 8½ (R. 93), on the question of assumption of risk, and in failing to charge that where the defect could not be foreseen by the exercise of ordinary care, and the situation was as open and apparent to the plaintiff as it was to the defendant, the decedent assumed the risk, and that there was no liability with the Railroad Company.

These errors, we contend, deprived your petitioner of rights granted it by the Federal Employers' Liability Act.

Points and Authorities.

1. *The limitation period of two years in the Federal Employers' Liability Act is a condition annexed to the right to sue.*

Reading Co. *v.* Koons, 271 U. S. 58.

Atlantic Coast Line R. Co. *v.* Burnette, 239 U. S. 199.

Central Vt. R. Co. *v.* White, 238 U. S. 507.

A. J. Phillips Co. *v.* Grand Trunk Western Ry. Co., 236 U. S. 662.

Gillette *v.* D. L. & W. R. Co., 91 N. J. Law R. 220, 102 Atl. 673 (where it ran against a minor).

Alvarado *v.* Sou. Pac. Co., — Tex. Civ. App. —, 193 S. W. 1108 (where it ran notwithstanding insanity).

Ganthier *v.* A. T. & S. F. R. Co., 176 U. S. 245.

Bement *v.* G. R. & I. Ry. Co., 194 Mich. 64.

Shinn *v.* N. Y. C. & St. L. Ry. Co., 24 Oh. App. 113

(In the last three cases, it ran although fraud was used to mislead the employee.)

2. *State procedure cannot affect substantial rights granted by the Federal Employers' Liability Act.*

N. O. & N. E. R. R. Co. *v.* Harris, 247 U. S. 367.

N. O. & N. E. R. R. Co. *v.* Scarlet, 249 U. S. 528.

Pryor *v.* Williams, 254 U. S. 43.

Norton *v.* Erie R. Co., 167 N. Y. Supp. 177.
Cotton *v.* Wabash R. Co., 198 Iowa, 535; 199 N. W. 1005.

3. *The Federal Employers' Liability Act creates separate causes of action, one because of personal injuries, and the other because of death.*

Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 65, 68.
St. L., I. M. & S. R. Co. *v.* Craft, 237 U. S. 648.
Mellen *v.* Goodyear, 277 U. S. 335.

4. *The cause of action for death of an employee under the Federal Employers' Liability Act accrues at the time of death.*

C. B. & Q. R. Co. *v.* Wells-Dickey Trust Co., 275 U. S. 161.
Reading Co. *v.* Koons, 271 U. S. 58.
Seaboard Air Line R. Co. *v.* Oliver, 261 Fed. 1.

5. *Settlement by an employee for injuries under the Federal Employers' Liability Act bars recovery by the beneficiaries for his death.*

Mellon *v.* Goodyear, 277 U. S. 335.

6. *Under the Federal Employers' Liability Act, failure of an employee to sue for two years after injury bars recovery by the beneficiaries for death.*

Rodgers *v.* Pennsylvania R. Co., 19 Fed. (2) 522.

The rule is the same under a state statute.

Seaboard Air Line Ry. *v.* Allen, 192 Fed. 480 (C. C. A. 2); Certiorari denied, 226 U. S. 612.

7. *If suit begun by employee terminates in judgment for Railroad Company, suit by beneficiaries for death would be barred.*

Southern Pacific R. Co. *v.* United States, 168 U. S. 1.

Norton *v.* Erie R. Co., 167 N. Y. Supp. 177.

Belch *v.* Seaboard Air Line Ry. Co., 176 N. C. 22, 96 S. E. 640.

Cotton *v.* Wabash R. Co., 198 Iowa, 535, 199 N. W. 1005.

Vaught *v.* Virginia & S. W. R. R. Co., 132 Tenn. 679, 179 S. W. 314.

Chicago, R. I. & P. Ry. Co. *v.* Schendel, 270 U. S. 611.

8. *Amendments may be made after limitation period to amplify an existing cause of action under the Federal Employers' Liability Act.*

(*a*) *Substitution of personal representative for individual plaintiff.*

M. K. & T. R. Co. *v.* Wulf, 226 U. S. 570.

(*b*) *Amending to allege interstate commerce.*

N. Y. C. & H. R. R. Co. *v.* Kinney, 260 U. S. 340.

Seaboard Air Line R. Co. *v.* Renn, 241 U. S. 290.

Seaboard Air Line R. Co. *v.* Koennecke, 239 U. S. 352.

B. & O. R. R. Co. *v.* Smith, 246 U. S. 653, affg. 169 Ky. 593.

(c) *Amending to explain terms of the complaint.*

Washington Ry. & E. Co. *v.* Scala, 244 U. S. 630.

U. S. Shipping Board *v.* Greenwald, 16 Fed. (2) 948 (C. C. A. 2.)

9. *No amendment may be made by adding a new cause of action if the new cause is barred by the limitation period.*

Union Pac. R. Co. *v.* Wyler, 158 U. S. 285.

Grand Trunk R. Co. *v.* Wright, 21 Fed. (2) 814 (C. C. A. 6), affirmed, 49 S. C. R. 176, on authority of Union Pac. R. Co. *v.* Wyler, 158 U. S. 285.

Brinkmeier *v.* Missouri Pac. R. Co., 224 U. S. 268.

Salyers *v.* United States, 257 Fed. 255 (C. C. A. 8).

United States *v.* Dalcour, 203 U. S. 408.

N. & G. Taylor Co. *v.* Anderson, 275 U. S. 431.

Sunlight Carbon Co. *v.* St. L. & S. F. R. Co., 15 Fed. (2) 802 (C. C. A. 8).

B. & O. R. R. Co. *v.* Branson, 131 Md. 688, 104 Atl. 356.

Capps *v.* A. C. L. R. Co., — No. Car. —, 111 S. E. 533.

Cotton *v.* Wabash R. Co., 198 Iowa, 535, 199 N. W. 1005.

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T. H. & I. R Co. *v.* Zehner, 166 Ind. 149.

Lavene *v.* Fredericks, 186 Ind. 333.

10. *Liberal construction of statutes regulating amendments does not permit addition of causes of action barred by limitation.*

N. & G. Taylor Co. *v.* Anderson, 275 U. S. 431.

Sunlight Carbon Co. *v.* St. L. & S. F. R. Co., 15 Fed. (2) 802 (C. C. A. 8).

11. *The errors in the charges to the jury were plain and produced material prejudice.*

L. & N. R. Co. *v.* Chatters, 278 U. S. —, (Decided Apr. 15, 1929) reversing 26 Fed. (2) 403 (C. C. A. 5).

Vicksburg & Meridian R. Co. *v.* O'Brien, 119 U. S. 99.

United States *v.* River Rouge Improvement Co. 269 U. S. 411.

Deal *et al. v.* United States, 274 U. S. 277.

Chesapeake & Ohio R. Co. *v.* Cochran, 22 Fed. (2) 22 (C. C. A. 4).

Y. & M. V. R. Co. *v.* Mullins, 249 U. S. 531.

Fillippon *v.* Albion Slate Co., 250 U. S. 76.

Erie R. Co. *v.* Murphy, 9 Fed. (2) 525 (C. C. A. 2).

12. *The errors are not controlled by Section 269 of the Judicial Code, because they are material and prejudicial.*

Camp *et al. v.* Gress, 250 U. S. 308.

Brock *v.* Northwestern Fuel Co., 130 U. S. 341.

Rumsey *v.* N. Y. Life Ins. Co. *et al.*, 267 Fed. 554; certiorari denied, 254 U. S. 654.

Liberty Warehouse Co. *v.* Grannis, 273 U. S. 70.

13. *Action for wrongful death was barred by limitation of two years from date of death.*

Reading Co. *v.* Koons, 271 U. S. 58.

C. B. & Q. R. Co. *v.* Wells-Dickey Trust Co., 275 U. S. 161.

Louisville, Evansville & St. Louis R. Co. *v.* Clarke, 152 U. S. 230.

Luce *v.* N. Y. C. & St. L. R. Co., 211 N. Y. Supp. 184.

14. *The employee assumes the risk from a defect that is as apparent to him as to the master.*

D. L. & W. R. Co. *v.* Koske, 278 U. S. —, No. 219 decided Feb. 18, 1929.

Jacobs *v.* Southern Ry. Co., 241 U. S. 229.

Pryor *v.* Williams, 254 U. S. 43.

Noftz *v.* B. & O. R. R. Co., 13 Fed. (2) 389 (C. C. A. 6).

Kaemmerling *v.* Athletic Mining & Smelting Co., 2 Fed. (2) 574 (C. C. A. 8).

15. *The master is required to use such care in furnishing appliances as is reasonably necessary to make the appliance suitable.*

Hough *v.* Ry. Co., 100 U. S. 213.

Gardner *v.* Mich. Cent. R. R. Co., 150 U. S. 349.

Y. & M. V. R. Co. *v* Mullins, 249 U. S. 531.

ARGUMENT.

It is conceded that this case arises under the Federal Employers' Liability Act, and that the amended

complaint setting up the claim for death was filed more than two years after the death. The two-year limitation period prescribed in the Federal Act is a condition annexed to the right to sue, nor need authority be cited to sustain the proposition that state procedure cannot affect a substantive right granted by a federal statute. The language of the statute seems plain. It gives the employee a right of action for injury, and a right of action is also given in case of death. Those, of course, were the provisions of the Act as originally drawn, April, 1908. By the amendment of April. 1910, the right of action given the employee for injuries can upon his death be prosecuted by a personal representative for the beneficiaries named.

In Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, this Court found (p. 65) that "the Act declares two distinct and independent liabilities, resting, of course, upon the common foundation of wrongful injury, but based upon altogether different principles." The court pointed out the conflict among the decisions in the states construing various survival statutes, and held that under the federal statute the cause of action for death was "independent of any cause of action which the decedent had," and that "it was one beyond that which the decedent had—one proceeding upon altogether different principles" (p. 68).

In St. L., I. M. & S. R. Co. *v.* Craft, 237 U. S. 648, this Court again considered the matter of the causes of action arising under the federal statute. In referring to the statute, Mr. Justice Van Devanter, delivering the opinion of the Court, said (p. 657):

> "It continues, as before, to provide for two distinct causes of action, one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives, where the injuries immediately or ultimately result in death * * *."

The learned Justice then refers to the statute providing for the survivorship of the action for injuries and says (p. 658):

> "And when this provision and Section One are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."

Continuing, it was pointed out that the statute did not seek to restrict the personal representative to one

cause of action to the exclusion of the other, or to require that a choice be made, but to limit him to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action.

It will be remembered, however, that neither in the Vreeland case, 227 U. S. 59, nor in the Craft case, 237 U. S. 648, nor in Northern Pac. R. Co. *v.* Maerkl, 198 Fed. 1 (C. C. A. 9), cited in the Craft case at the bottom of page 659, was there any question of limitation of action. The court, however, does make it clear in these cases that the statute does create two cases of action which are separate and distinct. Nothing in the statute itself, nor in the language of either of these opinions can be properly construed as meaning that suit must be brought to cover both causes of action, even though in order to do that it is necessary to disregard the two year limitation period. We contend that the obvious intent of the statute and of the decisions is that unless the limitation period is a bar to either or both, then there may be a single suit to include both causes of action. Congress did not express any exceptions to the statute in so far as the limitation period is concerned, and this Court has construed the limitation period to be a condition annexed to the right to bring a suit. It follows, it is submitted, that unless suit is brought within two years after the cause of action accrues, whether there is involved the cause of action for the injuries or the cause of action for the death, or whether both are involved, that the suit must be brought within two years after each

cause of action has accrued, and that it cannot be brought after the expiration of that period. In the present instance, therefore, assuming that she had a right of action for the death, the plaintiff is barred in so far as the death claim is concerned, because brought more than two years after the death occurred.

To be read with the cases holding that the two-year period is a condition of the right to sue, is Reading Co. *v.* Koons, 271 U. S. 58, where this court also held that the cause of action began to run from the time of the death of the employee and not from the appointment of the personal representative. It is submitted, therefore, that in the present case the running of the statute could not be postponed until the filing of the amended complaint. Here, too, the court proceeds on the basis of there being two cases of action created by the federal law.

This court reaffirmed its position on this question in Chicago, B. & W. R. Co. *v.* Wells-Dickey Trust Co., 275 U. S. 161, where in referring to the Koons case it stated, at page 163, that "the cause of action accrues at the death", and further said:

> "When it accrues there is an immediate, final and absolute vesting; * * * Upon Anderson's death an administrator might have been appointed and an action brought immediately."

It therefore follows, we contend, that if the cause of action accrued immediately upon the death, suit could not be delayed, as in this case, for more than two years after.

Further, in commenting on the statute, this Court said, at page 162:

> "For an injury resulting in death, the act gives two distinct causes of action. One is to compensate the injured person for his loss and suffering while he lives. * * * The second cause of action is to compensate persons other than the injured employee for pecuniary loss suffered by them through the employee's death."

The Vreeland, Craft and Koons cases, just referred to, are cited in the more recent case of Mellon, Director General of Railroads, *v.* Goodyear, 277 U. S. 335, where the court held that after settlement by an employee his beneficiaries could not sue under the federal law for death resulting from the injuries, because at the time of the death the employee no longer had a right to bring a suit. There the employee was injured July 31st, 1919. He made a settlement and gave a full release March 16th, 1920. He died May 4th, 1920. Suit was brought because of his death April 19th, 1921, which this Court held was barred.

This Court in the Goodyear case also cited Seaboard Air Line Ry. Co. *v.* Oliver, 261 Fed. 1 (C. C. A. 5), where the employee brought suit and had judgment, which was satisfied. The Circuit Court of Appeals there held that this was a bar to an action by the beneficiaries for the death.

It will be observed from the opinion in the Burtch case (R. 280), 163 N. E. 99, that the state court assumed as proved that which we submit is one of the questions in the case; namely, whether the right to sue

for the death merely expands or amplifies the suit based on the injuries. If the state court is correct, then obviously, it seems to us, there would not be two separate and distinct causes of action.

Moreover, we submit that the State Supreme Court is not sustained by the cases upon which it relies.

There are three kinds of decisions by the Supreme Court of the United States construing amendments to petitions under the Federal Employers' Liability Act.

The first is represented by M. K. & T. R. Co. *v.* Wulf, 226 U. S. 70, where the widow brought suit and before trial was substituted as administratrix. This substitution did not amplify the original cause of action, because the allegations of the petition were in nowise disturbed.

The second class involves amendments to allege interstate commerce at the time of the accident. N. Y. C. & H. R. R. Co. *v.* Kinney, 260 U. S. 340, and Seaboard Air Line R. Co. *v.* Renn, 241 U. S. 290.

The third class is represented by Washington Ry. & Electric Co. *v.* Scala, 244 U. S. 630, where the original petition said that the deceased did "suffer intense pain." An amendment was made to show "conscious pain and suffering." This Court, in speaking of these two phrases, said:

> "The difference between the two, if there is any difference at all, is too elusive for application in the practical administration of justice, and the claim that this amendment added a new cause of action to the declaration is too fanciful for discussion. At most it was a slight elaboration of a probably sufficiently claimed

element of damage, and the allowance of the amendment was well within the authority and the effect of Missouri, Kansas & Texas Ry. Co. *v.* Wulf, 226 U. S. 570; Illinois Surety Co. *v.* Peeler, 240 U. S. 214, and Seaboard Air Line Ry. *v.* Renn, 241 U. S. 290."

We contend that the amendment in the Burtch case does not come within any of these classes. The difference between a suit for injuries and a suit for injuries and death is not a difference "too elusive for application in the practical administration of justice." It is a substantial difference created by Act of Congress. The question is not one of substitution of one plaintiff for another, nor a single new allegation claiming under the federal law. Here the plaintiff sought to combine by amendment in one suit two separate and distinct causes of action, although one of the causes of action is clearly barred by the two-year period of the statute.

On the other hand, it is our contention that the situation comes within Union Pacific R. Co. *v.* Wyler, 158 U. S. 285, where, after action based on the common law, an amendment was attempted under a statute in derogation of the common law. This Court held that the statute of limitations applied to such a new cause of action.

In Grand Trunk Ry. Co. *v.* Wright, 21 Fed. (2) 814, affirmed, 49 S. C. R. 176, the plaintiff sued under the Michigan death statute, and at the trial, more than seven years after the injury, amended and relied altogether on the Federal Employers' Liability Statute. The Court of Appeals thought the amended declara-

tion did not show sufficient facts to support a resort to the federal law, but this Court put its affirmance squarely on the Wyler case.

Brinkmeier *v.* Missouri Pacific R. Co., 224 U. S. 268, involved the Federal Safety Appliance Statute prior to amendment, this Court holding that unless the declaration alleged that the defective car was in interstate commerce, the petition was bad, and the amendment could not be made after the limitation period.

In N. & G. Taylor Co. *v.* Anderson, 275 U. S. 431, an attempt was made to amend by adding a cause of action barred by a state statute of limitations. The suit as originally brought was upon an agreement made by the plaintiff corporation with the defendants, whereas it had been made by a partnership since converted into the plaintiff corporation. It was attempted to amend by setting out the real facts. This court held that the change was not merely one of form, but involved a different "fundamental substance." It is our contention that if under such circumstances an amendment can not be allowed, then all the more was the proposed amendment in our case improper, since the cause of action by statute as well as by decision of this Court was separate and distinct from the one involved in the original petition, and where the limitation period is a condition annexed to the right to sue.

In Sunlight Carbon Co. *v.* St. L., S. F. R. Co., 15 Fed. (2) 802, there was involved a claim for damages by fire occurring in October, 1921. While suit was pending, and before judgment, an amendment was proposed in January, 1925, based upon willful negligence.

Under the Oklahoma statute, such a suit had to be brought within two years. The Court of Appeals held that this amended complaint was a new cause of action barred by statute, and therefore could not be considered, citing Union Pacific R. Co. *v.* Wyler, 158 U. S. 285.

In B. & O. R. Co *v.* Branson, 131 Md. 688, the accident occurred September 6th, 1913. There was a verdict and judgment under the Federal Act, affirmed by the Court of Appeals May 17th, 1916, which was reversed in January, 1917 (B. & O. R. Co. *v.* Branson, 242 U. S. 623). The memorandum opinion cited various cases as to whether employer were in state or interstate commerce. When the case came back to the Court of Appeals of Maryland, the plaintiff below filed a motion to remand to the Circuit Court on an amended petition, under the common law. This was refused because the plaintiff had lost his suit based on the federal statute, and because the amendment stated a new cause of action based on the common law, especially since the accident occurred more than four years prior to the time that the motion to amend was filed.

In Capps *v.* A. C. L. R. Co., — N. Car. —, 111 S. E. 533, the accident occurred Auguist 16th, 1915, with death resulting three days later. Suit was brought May 16th, 1916, under the federal law. The answer denied interstate commerce. An amendment filed June 28th, 1917, set up a cause of action under the state statute. The Railroad Company removed to the federal court. The plaintiff then took a voluntary non-suit as to the case under the state law, the Rail-

road Company claiming that it was barred by a one year state period of limitation. The case thereupon was remanded. On June 25th, 1919, the plaintiff filed a new suit, with two causes of action, one under the state and one under the federal law, permitting the original suit, based on the federal law, to remain. On trial of the first case there was a non-suit, the court taking the position that no interstate commerce had been shown. The Supreme Court affirmed, 101 S. E. 216, and a petition for a certiorari was denied, 252 U. S. 80. The defendant railroad filed a motion to dismiss the second suit which was overruled. The Court of Appeals held an appeal premature (108 S. E. 300). The case was tried in November, 1921. The court held that there had been a previous adjudication of the interstate phase, but sustained judgment for the railroad on the ground that action upon the state law set up a new cause of action that was barred by the one-year limitation period.

In Salyers *v.* United States, 257 Fed. 255 (C. C. A. 8), the plaintiff, having two causes of action, stated but one in his original petition, and later sought to amend by setting up the second after the limitation period. The court refused, citing the Wyler case, although the amount asked for in the original petition was large enough to cover both claims.

In Cotton *v.* Wabash Ry. Co., 198 Iowa 535, 199 N. W. 1005, the plaintiff was injured November 29th, 1917, while in interstate commerce. He brought suit September 29th, 1919. In January, 1921, the suit was dismissed without prejudice. Within six months, on

June 7th, 1921, a new suit was brought under the Federal law. A demurrer was sustained because the petition came too late, being filed more than two years after the date on which the right of action accrued, although a state statute permitted a new suit within six months after the dismissal for any cause except negligence of its prosecution.

In Norton *v.* Erie R. Co., 167 N. Y. Supp. 177, the employee was injured November 25th, 1907, and died a short time after. An administratrix sued in April, 1910, under the New York statutes. Upon the trial she withdrew a juror, and later was allowed to amend, claiming under the Federal statute. This was held error because the amendment came two years after the cause of action accrued, notwithstanding a state statute permitted such an amendment if the suit had been under the state law.

In Seaboard Aid Line R. Co. *v.* Allen, 192 Fed. 480 (C. C. A. 2), certiorari denied, 226 U. S. 612, the action was under the state law. The plaintiff died three years after the accident, without suing. The limitation period for an injury was one year. Within two years after death the present suit was instituted. This would have been within the state statute, provided the plaintiff during his lifetime had not barred the action by his failure to sue. The court held that no action could be maintained because at the time of the plaintiff's death there was no right in the plaintiff to maintain a suit for the injuries.

In Mellon *v.* Goodyear, 277 U. S. 335, this court reviewed several of its own decisions involving the

right of an administrator to sue for death where during the lifetime of the decedent the latter had acted so as to bar such a suit from being brought, the gist of the holding being that there could be no suit for a death unless the employee at the time had a right to sue. Here the decedent had a judgment pending at the time of his death, so that he had already exercised his right to sue.

We have been able to find only one decision which could by any possibility militate against this position, L. & N. R. Co. *v.* Echols, 203 Ala. 627. The employee was injured August 24th, 1912. He brought suit October 7th, 1912, forty-four days after he was injured. The case was tried twice. The plaintiff died in June, 1916. The case was revived in the name of the personal representative. In July, 1918, amendments were allowed which set up the interstate character of the employment, and which also added a count for damages growing out of the death. The court allowed both of these amendments. It based its conclusion upon the decision of this Court in the Craft and Wulf cases, which we have heretofore considered, and also on B. & O. R. R. Co. *v.* Smith, 246 U. S. 653, which affirmed, in a memorandum opinion on the basis of the Wulf and Craft and similar cases, the decision of the Kentucky Court of Appeals (169 Ky. 593). As we have heretofore attempted to point out, in neither the Craft, Wulf nor Maerkl case was any consideration given to the limitation period. Moreover, the character of the amendments allowed did not involve an attempt to state a new cause of action, as here.

The amendment in the Kentucky case of B. & O. R. Co. *v.* Smith involved an increase in the amount of damages asked, and an attempt to allege interstate commerce, but did not change otherwise the nature of the suit. The plaintiff throughout was the injured employee. The element of death intervening was not in the case.

The accident occurred March 29, 1909, and the suit was brought March 19, 1911. The principal contention before the Kentucky court was whether the plaintiff was prevented from amending to show interstate commerce after two years. The question that is involved in our present case was not in the Kentucky case, nor has it appeared in any decision of the Court. The situation in the Burtch case, now before you, may be aptly described in the language of Mr. Justice Butler in N. & G. Taylor *v.* Anderson, 275 U. S. 431 (p. 439): "The change was not merely one of form; the fundamental substance of the claim was different."

There is nothing in the Indiana statutes or decisions contrary to the general rule that a new cause of action can not be set up by way of amendment after limitations.

In T. H. & I. R. Co. *v.* Zehner, 166 Ind. 149, and in Lavene *v.* Fredericks, 186 Ind. 333, although the amendments were allowed, the court states the rule to be that if the amendment states a new cause of action, it will not be permitted, especially where the statute bars the cause of action attempted to be added.

Section 423, Burns' 1926 Indiana Statutes, permitting amendments, distinctly provides that this be lim-

ited to cases where the amendment will not deprive a party of any substantial right. We believe there is nothing more substantial than the right of which we have been deprived, namely, that the cause of action for the death, barred by the Act of Congress, should not have been submitted to the jury.

At this point we respectfully call attention to a paragraph in the opinion of the Supreme Court of Indiana in the Burtch case (R. 281), which, for ready convenience, we quote:

> "Moreover, in the case at bar, the United States Supreme Court has held that Burtch's injuries were sustained in interstate commerce, has determined that 'in that view it should have been submitted to the jury', and remanded the the cause for a new trial for that purpose. That court decided the former appeal more than two years after the cause of action for Burtch's injuries arose and was advised as to the length of time provided by statute as the limitation within which an action for the same could be brought, as well as to the date of the injury and death, and we cannot presume that the court would have remanded the cause for a new trial, if at that time it was impossible under the law to amend the complaint so that it could be submitted to the jury as directed by the court."

We submit that the court made a rash presumption, unwarranted by anything in the federal statutes and by anything in your opinion (263 U. S. 540). There was nothing in that case relative to the claim on account of death, and nothing referring to the period of limitations.

When, after reversing, this Court remanded to the Indiana state courts, it did not, and, we submit, could not, authorize the Indiana courts to entertain a suit for the death. The fact that your reversal came two years after Burtch's death raises no presumption whatever on the point. The Act of Congress is plain and unambiguous, and the decisions of this Court are of one accord, namely, that the two year period is a condition annexed to the right to sue. Certainly that right can not be said to exist by reason of some implication involved in your language, or as a result of an inference which the Supreme Court of Indiana attempts to draw merely because you reversed the suit for the injuries two years after Burtch's death. Judicial legislation has never gone that far.

We also contend that the errors which we claim exist are not technical, and that they affect the substantial rights of the petitioner within the provisions of Section 269 of the Judicial Code, U. S. C. Title 28, Ch. 10, Sec. 391.

There was no dispute concerning the various dates involved; that is to say, the suit for Burtch's death was brought more than two years after he died. Nor is there any dispute as to his having recovered a judgment, and as to his having died while that judment was pending in the Supreme Court of the State of Indiana.

These rulings resulted in an intermingling of the two causes of action when presented to the jury. They were told that if they found for the plaintiff, she was entitled to damages such as Burtch might have re-

covered for his injuries just before he died, and also damages sustained by his widow and children because of his death. It is our contention that these rulings presented to the jury two causes of action as a single cause of action, so that it does not follow that the verdict can be sustained on the theory that it is based solely on the injuries and in no wise on the death.

In Erie R. Co. *v.* Murphy, 9 Fed. (2) 525, (C. C. A. 2), a case under the Federal Employers' Liability Act, the court said:

> "To render error harmless it must be held that it *could* not prejudice the rights of the complaining party."

And in Fillippon *v.* Albion Vein Slate Co., 250 U. S. 76, this Court held:

> "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury, and they furnish ground for reversal unless it affirmatively appears that they were harmless."

Later, in United States *v.* River Rouge Improvement Company, 269 U. S. 411, this Court, near the close of the opinion, cited the rule as embodied in Section 269 of the Judicial Code, and held that the instruction complained of, affecting as it did the elements of benefits in an appropriation proceeding,

> "* * * could not but mislead the jury in reference to a material element necessary for its consideration in determining the amounts of the awards * * *."

Moreover, in Y. & M. V. R. Co. *v.* Mullins, 249 U. S. 531, under the Federal Employers' Liability Act, an error in instructing the jury that the duty of the railroad was absolute, whereas the duty was merely to use reasonable care, was held to be substantial and prejudicial.

In a recent case, Southern Ry. Co. *v.* Chatters, 287 U. S. —, decided April 15, 1929, reversing 26 Fed. (2) 403 (C. C. A. 5), this Court held that there being no basis for a joint liability against the Southern, it was prejudicial error to charge the jury on the question of joint liability. Although in the present case there is only one defendant, nevertheless there are two causes of action involved. The jury was in effect told to make a finding of damages as to both causes of action, although we contend that the one cause of action, to wit, that growing out of the death, was not before the court. If our contention as to that is sound (and we submit that it is), then it seems to us, in view of the holding of this Court in the Chatters case, the error in the Burtch case is prejudicial to the Railroad Company.

Instruction No. 8½ (R. 93), as to assumption of risk, given by the court at the instance of the plaintiff, was in direct variance and overcame the effect of instructions 16 and 17 given at the request of the defendant (R. 85-86). It directed the jury that Burtch did not assume the risk unless "he knew and appreciated the hazards and dangers to which he was about to be exposed, and from which he was injured, and with full knowledge of such dangers and probable con-

sequences, he voluntarily encountered the same " (R. 93).

There are several instructions on assumption of risk given at the request of the defendant. For example, in No. 12 (R. 84) the court told the jury that if a defect existed which was not known to the defendant, nor which could have been discovered by him by the use of ordinary care, that they should find for the defendant. This was repeated somewhat in No. 13 (R. 84) and in No. 14 (R. 84), where the duty of the defendant was fixed as the exercise of ordinary and reasonable care. In No. 16 (R. 85) the duty of the employee was defined as using reasonable care in examining his surroundings and the simple tools with which he is engaged, and that if there was a hazard equally open to his observation as that of his employer, he assumed the risk. In instruction No. 19 (R. 86), requested by the defendant, the duty of the employer was limited as not requiring a search, or a critical inspection of appliances for defects, but that the employee was charged with the duty of exercising ordinary care in examining tools and appliances with which the employee was ordinarily familiar.

It is submitted that the appliance, an ordinary timber, was not one peculiar for use on the railroad. Burtch and another selected the timbers from a sawmill not under the control of the railroad (R., 212). The testing was a matter as open to the conductor as to the decedent. The only person who observed any knot on the timbers was the railroad agent, who made an examination after the accident, and stated that the

knot was visible along one edge of the timber, but it was not visible either on top or bottom (R. 155). No other witness testified regarding the possibility of any defect in any of the timbers.

As the case is one under the Federal Employers' Liability Act, not involving a statute designed to protect the safety of an employee, the common-law rules as to assumption of risk are in effect. We submit that the court misled the jury when it gave Instruction No. 8½ (R. 93), that they must find that the decedent had actual knowledge of the defect before he assumed the risk, and at the same time gave the instructions (R. 85-86) requested by the plaintiff, that if the defect could not be ascertained by the exercise of reasonable care, and was no more obvious to the defendant than it was to the plaintiff, that the risk was assumed. In fact, under these circumstances, we contend that there was no negligence on the part of the railroad.

In Gardner *v.* Michigan Central R. Co. 150 U. S. 349, on page 359, in referring to Hough *v.* Ry. Co., 100 U. S. 213, this Court said that the master is not held as warranting the absolute safety of an appliance, "but he is bound to exercise the care which the exigency reasonably demands in furnishing such as is adequate and suitable." More recent decisions of this Court have not modified that principle. The appliance here, we submit, was as simple as the claw-bar involved in Pryor *et al.* against Williams, 254 U. S. 43. In Y. & M. V. R. R. Co. *et al. v.* Mullins, 249 U. S. 531 the court

repeated the ruling that it was not an absolute duty upon the master to furnish a safe place, but merely to exercise reasonable care. In D., L. & W. R. Co. *v.* Koske, decided February 18, 1929, 278 U. S. —, this Court held that the plaintiff assumed the risk of stepping into a drain whose location was as apparent to him as it was to the defendant. In Kaemmerling *v.* Athletic Mining & Smelting Co., 2 Federal (2nd) 574 (C. C. A. 8), the court states various principles covering the obligation of the master to the servant in furnishing appliances and concludes, page 578, first column near bottom:

> "From the foregoing it would appear—and the text is supported by a wilderness of authorities—that the servant does not assume the risk of hidden and unusual defects which in the exercise of ordinary care he could not discover. On the other hand the master is not liable for unforeseen accidents resulting from latent or hidden defects which he in the exercise of a degree of care commensurate with the business and situation would not discover."

In Noftz *v.* B. & O. Ry. Co., 13 Federal (2nd) 389 (C. C. A. 6), which arose under a state liability law, the court near the close of the opinion states:

> "It further appears that the defect in this timber was of such a character and so hidden from view before the removal of the siding, incident to making these repairs, that it could not have been discovered by reasonable and proper care, tests, or inspection."

We submit, therefore, that the court below erred in instructing the jury that the plaintiff would have to know of the defect before he assumed the risk, even though that defect could not have been discovered by the defendant in the exercise of reasonable care under the circumstances.

For these reasons, we respectfully submit that the decision of the Supreme Court of the State of Indiana is erroneous, and that its judgment should be reversed.

Respectfully submitted,

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